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DIVORCE.

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THE subject of the present article is not whether marriage can in any case be dissolved, but for what causes the state may rightfully dissolve it, or rather, may listen to a petition from a husband or a wife, or from both, for its dissolution. Properly speaking, a divorce can never be required by the state, but only permitted. There may be marriages which, for some reason and chiefly on moral grounds, are void *ab initio*, and therefore were never valid. To declare that marriage never existed in such cases is not to dissolve a marriage, but to dissolve a cohabitation which never was a marriage. That the state, if any power, ought to do this, is generally admitted; and it is quite as generally admitted that the state ought to define the causes for which dissolution of marriage, if ever allowed, may take place. In such cases the married party who is aggrieved may apply for a remedy, and here a court must intervene; or the party aggrieved may condone the offense of the other, and here the condonation precludes all action of the state through its courts. Whether the remedy ought to include the right of remarriage, as well as that of separation, is the important point which we shall try to discuss. It seems clear, however, that the state ought never to adopt the rule of granting divorce by mutual consent, for in every such

case the parties will consult only their own interests and desire; while the state, as the guardian of the highest interests of a community which has perpetual existence, must look to the permanent good of all. Moreover, religion and morals have more to do with marriage and the welfare of the family than with any other institutions; so that, if the state should make light of these spiritual powers, or even disregard a pervading opinion entertained concerning them by the people, it may do itself an injury which admits of no reparation.

The feeling that family relations are sacred did not come at first from the Hebrew scriptures nor from the Gospel, but was suggested by old experiences of mankind. How the Romans felt in their earliest times is shown by the antique, solemn forms of *confarreatio*, in which the two persons to be united in marriage partook of a cake of spelt (or *far*, as they called it), in the presence of one of the principal priests, and before ten witnesses. This may be called a sacramental rite, betokening the communion, or common life, of the family. Opposite to this was the rite of *diffarreatio*, connected with divorce, which was pronounced by a court composed of family relatives. According to the historian Dionysius, no divorce took place at Rome until five hundred and twenty years from the foundation of the city (2, § 25). But this is hardly credible.

Nowhere is the closeness of the union between man and wife more forcibly and beautifully set forth than in an early passage of Genesis, where it is said, "For this cause shall a man leave his father and mother, and cleave to his wife, and they shall be one flesh." Here we notice first that a son is expected to quit the parental roof and find a wife away from home; hence shunning the crime of incest, and forming a new household with a stranger, besides binding the parts of society together. He is to cleave to his wife, and they are to become one flesh. In this passage polygamy and divorce are forbidden. For how could one man be incorporated with more women than one, and how could so close a union as oneness of flesh admit of separation?

This passage is used by Christ in the gospels (Matth. v. 31–33, and xix. 3–9, Mark x. 2–12) as a support for his command concerning divorce. In Luke also (xvi. 18), a general rule is given which needs to be interpreted by the other more full statements. That Paul also was acquainted with the words of Christ, is evident from I. Corinth., vii. 10, 11. In Matthew, ch. xix., the

Pharisees are said to have put the question to Jesus, whether it was lawful to put away a wife for every cause; and to have received from Him the answer (verse 9) that "Whosoever shall put away his wife, except for fornication, and shall marry another, committeth adultery" (or "maketh her an adulteress," as it stands in ch. v. 32, or, "committeth adultery against her," as in Mark x. 11); and "he that marrieth her, when she is put away, committeth adultery." This last clause is wanting in some early MSS. in ch. xix. but is found in ch. v. 32; and in Mark x. 12 we have the words, "If she herself shall put away her husband and marry another, she committeth adultery." This last passage is singular, as including a woman's putting away her husband; which was not known to Jewish law, although allowed and frequent among the Greeks and Romans, and at that time practiced in the Herodian family to some extent. The Jews living outside of Palestine may have gone beyond the original permission of divorce, which was confined to the husband only.

This restriction of divorce to the single cause of adultery was met on the part of the Pharisees with the question: "Why, then, did Moses command to give a bill of divorcement, and to put her away?" to which Jesus answered: "Moses, for your hardness of heart, suffered you to put away your wives; but from the beginning it hath not been so." That is, Christ, although admitting Moses to be a divinely appointed legislator, did not admit that the law was a perfect code. The license of divorcing a wife was owing to an inveterate habit of the Hebrew people, which had no justification in the nature of marriage or of the family, but rather sprang from a vicious state of society than from man's nature at the first or from an ordinance of God. A wise lawgiver will sooner endure some rooted evils in a state which he is founding, than by too great restraint expose his institutions to ruin.

Christ proceeds to explain what he intends by "but from the beginning it hath not been so." "Have ye not read," says he, "that he who made (or created) them from the beginning, made male and female, and said, 'for this cause shall a man leave father and mother, and shall cleave to his wife, and the twain shall become one flesh?'" (*the twain* appears in the Septuagint, but only *they* — which implies the twain — in the Hebrew). Then he adds, as his own comment or deduction, "so, then, they are no more twain, but one flesh." Then comes his command:

"What, therefore, God has joined together, let no man put asunder." It is a command resting as an inference on the idea that marriage is a divinely constituted union, broken, so long as the twain are alive, by one crime only, which destroys it and prevents its fulfilling its end. And as a command it has had, since it was first given, both in the Church of Christ and in societies which do not fully acknowledge him, a vast influence. The history of the Christian idea of marriage, of legislation growing out of it, of the contest between the new views in the Christian Church and the law of the Roman empire, if we could give it in such a brief article as this, would show what a might has been wielded by a few words, believed to come from a legislator who had a divine right to reform and purify the most important of human institutions. And this power will always belong to them, until a general decay of faith in God and in Christ shall spread over all nations that can now be called Christian. What has been done by this brief command consists in its declaring that marriage is not to be dissolved except in one single case. If it has done any good, this good has been effected by the prohibition of divorce for all other causes.

It will, I think, be generally conceded, that the sanctity of marriage, its indissoluble character, except as obliterated by one crime, and to a great extent the reverence felt in Christian lands for the family virtues, are chiefly due to the few words which Christ pronounced on the subject of divorce — words let me add which not only frown on the laws of divorce in the Old Testament, but forbid, also, its introduction into the Christian Church. But on one point of some difficulty he expressed no opinion. The new religion would inevitably cause divorce rather than peace as it entered heathen lands: a husband, it might be, would adhere to his old religion, while the wife would be attracted by the new gospel from Judea. In other cases, where both became converts to Christianity, difficulties might arise between them, and one would forsake the other. In this last case the wife is commanded by the Apostle Paul to be reconciled to her husband, or to remain unmarried (I. Cor., vii. 10–11). The command he gives as from "the Lord," and it is an easy inference from the words of Christ which we have already noticed. In the other case, where one of the parties was an unbeliever, the apostolic authority of Paul could be acknowledged by the believer only. He or she, therefore, is ordered not to leave the

unbelieving partner, but to continue the union unless he departs; and the Apostle adds these remarkable words, that the children of such a family, when only one of its heads is a Christian, are holy children. Why, then, should a Christian desert his or her duties in a consecrated place? But the unbelieving or heathen man or woman might insist on breaking up the union. Here the Apostle says to the Christian wife, "if the unbelieving depart, let him depart. A brother or a sister is not under bondage in such cases, but God hath called us in peace." By this we understand, with Meyer, Stanley, Neander, Tholuck, and even with De Wette, that the Christian believer is not under the severe bondage of preventing disruption of marriage by active measures of his own, yet that it does not follow that in such cases liberty of remarriage is allowed. Much less would the apostle approve of this where both parties were professed Christians. (Compare I. Cor. vii. 11.) But earlier Protestant exegesis did find in this passage a permission to the Christian party thus deserted by the heathen to marry again, and it extended this allowance to a case where a professed Christian acted in a heathenish way, and deserted his or her consort. When this path was once broken, Protestant lawmakers, with the sanction of Protestant theologians, allowed the courts to grant divorce for desertion. Nor could they in many countries stop there; but whatever struck as severe a blow at the family union as was struck by desertion brought with it the same privilege, at least to the injured party, of dissolving the union and forming another with some one else.

Thus a new set of causes for divorce was introduced, especially within the last century and a half, into the laws of a number of Protestant countries, as into those of Prussia and of many other German states, of the Scandinavian lands, and of most of the States of our Union. The remedy is variously applied, being more generally complete divorce, but sometimes separation only, although for causes unnoticed by early law. In England and Wales, where for a long time the ecclesiastical courts granted only separation, following the old Catholic system, a new plan of legislation, in 1857, 1858, and 1860, abolished the jurisdiction of the ecclesiastical courts, and constituted a new court for divorce and matrimonial causes. Here divorce may be granted for the cause of the wife's adultery, and for certain grosser forms of this crime on the husband's part, and judicial

separation is the remedy for certain other causes. In many Catholic lands ecclesiastical law gave way, in or since the French Revolution, to a threefold legislation under the control of the state. Some of these lands adhered to the Catholic doctrine of the indissolubility of marriage, and now grant only separation for certain determinate causes. Such is the case in France since 1816; in Italy, since 1866; in Portugal, since 1868; in Spain, since 1875—where, however, if we mistake not, the law furnishes its remedy of separation in civil marriages only. Belgium, again, gives option between divorce and separation, according to the choice of the complainant; while Austria has special laws for Protestants, Jews, and Catholics, according to their religious professions.

We are now prepared to inquire, What condition of law, of public opinion, and of sentiment, is best for the religion, morality, and permanent welfare of the state—that in which divorce with liberty of remarriage can be obtained by an injured wife or husband for any one of a large number of causes, or that in which marriage can be dissolved for one cause only, while separation is the legal remedy for any causes for which it may seem best to the law-makers to allow a wedded pair to live apart? The question also deserves to be looked at, whether the law itself, by its own strictness and limited relief to a discontented wife or husband, may not lead one or both of them to the higher crime which makes divorce possible. These inquiries, however, may not admit of a satisfactory solution, since the condition of morals and of national opinion varies not a little in the different countries of the Christian world, in the same age, and much more in different ages. We see these differences reflected in the literature of different nations. In one nation, books painting the overpowering sway of passion, and making all plausible excuses even for adultery, corrupt the sentiments of many; while, in another, the tone of the poet or the novelist will be on the side of independent thought and pure morals. And again, in one land the administration of justice may be such that the judge thinks that he has done all that he ought when he decides a divorce case on the most perfunctory examination; while, in another, he is expected to endeavor to reconcile the parties, and to give due diligence to prevent and ferret out collusions. In one country a case of divorce may be decided in an hour; in another, law is as slow in such cases as elsewhere. Of the delays

in such suits, a French writer says to those who expect a speedy decision: "Profonde erreur! On se marie vite, on ne se sépare de même"; and adds, "Oh! les lenteurs de procédure; il faut en avoir été victime pour les connaître."

We must not, therefore, in making comparisons of the marriage and divorce statistics of different countries, infer at once, from the different ratios between the number of divorces and that of marriages or of population, the relative standing of these countries in regard to one of the most important points of social morality. A much safer rule is obtained when we take considerable periods together and find divorces increasing at a much greater rate than marriages or population or both. And the diminished rate of marriages, of itself, for a few years, may be due to temporary causes; so that only long periods of such diminution betoken the decay and deterioration of society at this vital point. Of this the condition of Rome at the beginning of the empire, as contrasted with the era of the fall of Carthage and the invasion of Greece, furnishes a striking illustration.

But another matter more closely concerns us. What does experience teach to be the best law for society and the family? One which allows absolute divorce for adultery only, permitting separation for a number of wrongs against domestic welfare, or one which holds out liberty of remarriage as the relief in all cases of unhappy wedlock? The main consideration here is that the law, by making a discrimination between the highest crime and all the other wrongs against marriage, best expresses the feeling of a moral and pure society in regard to the heinousness of adultery. This crime bears the same relation to the family as treason to the state and murder to human life; and the penalty of death attached to it in many ancient codes, especially the exculpation of the injured man for killing the injurer when taken in *flagrante delicto*, shows how mankind have very generally looked on this offense against morality. But in modern times things are altered. If any penalty is inflicted it is fine or imprisonment; and when adultery is made a cause for divorce, it is very often not made a ground for legal trial and punishment. All this shows a great want of moral feeling in the community. As if to avoid the shame and scandal produced by a trial were a greater evil than the exposure and punishment would be a good, even although by such exposure the evil would be greatly diminished. In England it is allowed

to the wife divorced for her adultery to marry her paramour at once; thus the law helps the guilty parties to gain the end for which they committed the crime, while in many communities the guilty party, or at least the party guilty of adultery, is forbidden to marry at all during the life of the party which has brought the complaint.

It will be said, however, that to place adultery by itself as alone terminating marriage offers a premium to the crime itself. That this may happen under laws like that of England I can easily conceive. Chancellor Kent says on this point (Comment. ii., 106), that he has "had occasion to believe, in the exercise of a judicial cognizance over various cases of divorce, that the sin of adultery was sometimes committed on the part of the husband for the very purpose of divorce." But is there not a very easy way of preventing the law itself from tempting married persons to committing this sin? Is pity for a fallen wife so rational that it ought to extinguish the feeling of justice and overbalance the public good? Let such marriages between the guilty be prohibited, as we have already said, and there would be fewer instances of similar guilt.

But we pass on to those divorce laws in which no distinction is made between the crime of adultery and any other wrongs affecting the relation of marriage. There are two such classes of laws: the one grants divorce with the liberty of marrying again in all cases; the other grants no divorce in any case, but separation as the sole remedy for all matrimonial wrongs. The latter of these classes of laws naturally originated in Catholic countries. As long as the old Church was able to keep intact its power over marriage, divorce, legitimacy, and even over inheritance, there was no dissolution of the tie between two Christians; but when in Protestant countries the sacramental theory of marriage ceased to be believed, and at a later period, when faith in the authority of the Church was weakened, the states once Catholic took into their own hands the power of altering the laws touching family relations. But almost everywhere, over the Catholic countries of Europe, the liberty of remarriage after separation was prohibited, both on account of the old feeling still remaining of the sacredness of marriage, and perhaps also on account of the fear lest the wider opening of the gates should introduce extended immorality. The experience of France in the Revolution, in this respect, may have taught Europe a healthy lesson.

The benefits resulting from this refusal of full divorce in all these countries are principally confined to the possibility of reconciliation and the resumption of the former condition of marriage between alienated parties. The same system, in short, which the Catholic Church adopted and undoudtedly with much good effect, of reconciling husbands and wives, may be and is continued with considerable benefit by the judicial authorities. Thus, in the present kingdom of Italy, between the beginning of 1866, when the new code came into operation, and the end of 1879, there were, in a population of over 26,000,000, 11,431 suits for separation, or an annual mean of 81.7 for fourteen years. Of these suits, 151 were abandoned before they came under the cognizance of the presiding judge, 1207 reconciliations were effected by that magistrate, and 2,815 suits were abandoned during trial.

This is a new experiment, and for that reason may not serve as a rule. The increase of suits for separation, where only separation can be obtained from the courts, is illustrated by the experience of France through a longer period. Between 1840 and 1874 the suits granted were 43,486, and the ratio of the separations to marriages for the first ten years was nearly as 1 to 371.8; but in the last five years it was as 1 to 151.7, or considerably more than double. Adultery furnished a cause for one out of ten of these suits.

In Belgium,—a Catholic country,—divorce and separation are both allowed by law, according to the choice of the complainant. Here the advance between 1840 and 1874 was in divorces from 28 to 144, or more than four times as many, and in separations from 25 to 57, or as 1 to 2.3. The same increase of applications for divorce (which are for adultery only), as compared with the separations, is found in the English tables (1867–1878). The petitions for divorce are about four times as many as for separation, and the decrees for divorce six times as many as for separation, leaving out of the account the decrees *nisi*. It is evident, from the preference in Belgium, where the choice is open, and in England where the petitions for divorce represent adultery only, that the leading and growing desire is to be separated from a consort and to be authorized to marry again.

We can say but a word or two on the laws which are in force through most of the Protestant countries of Europe and through most of the United States, wherever full divorce is the sole

remedy in matrimonial complaints. Here there is no temptation to commit a crime like adultery in order to be able to marry again, and yet the evils are as great, if not greater, than under any other form of legislation. In the United States the number of divorces has been long on a steady increase in some States, while in others there may be a tendency to reach a maximum and remain stationary. But a ratio like that in Connecticut, of one divorce to 11.06 marriages for twenty-one years; or that in Vermont, of 1 to 17.6 for nineteen years; or that in Massachusetts, of 1 to 35.8 for the same period, beginning with 1 to 51.0 in 1860 and ending in 1878 with 1 to 21.4, shows no healthy condition of society. The increase of divorces in this latter State is accompanied, says Mr. Carroll D. Wright, by an increase in the number of the leading crimes against chastity and infant life. What if the disease does not appear in the better classes of society; is it not a terrible thing to have a corrupt lower class increasing in these old and staid communities? Nor can we believe that the condition of things is any better in those States which do not publish statistics, if we may judge from single specimens. In St. Louis the number of divorces in 1879 was 490, or as 1 to 700 inhabitants nearly, and in San Francisco the divorces were 333 in 1880, or about as 1 to 702; while in Connecticut the ratio of divorces to population was about as 1 to 1906, and in Massachusetts, in 1878, about as 1 to 2971. In Wayne County, Michigan, containing 200,000 inhabitants, according to a recent treatise of Judge Jennison "on the pleadings and practice of the Court of Chancery," there was a ratio of 1 divorce to 796 of the population; and in Kent County, in sixteen months since January 1, 1881, there were 921 marriages recorded and 202 divorce suits commenced in a population of 75,000. On the whole, there can be little, if any question, that the ratio of divorces to marriages or to population exeeds that of any country in the Christian world.

Sed manum de tabula. The considerations advanced in this article lead us, we think, to the following, among other conclusions:

First. An increase in the number of causes for divorce granted by law increases, at least for a long period, the number of divorces themselves. But separations are by no means so much in demand as are divorces when the law permits them to be granted for similar causes.

Second. To grant separations without leave of remarriage is not so disastrous to family life as to grant divorces, which but spread the evil for which they are provided as a remedy. Such separations may be granted for gross violations of matrimonial duties without coming into conflict with the feeling or faith of the great majority of Christian believers.

Third. But, to grant divorce except for adultery, does come into conflict with the faith and discipline of large bodies of Christians. This is a very serious evil. It holds out a relief which multitudes are taught to believe to be unlawful. It destroys the dread which breaking up and reconstituting families is fitted to excite. If it tempts to commit the most serious crime in order to obtain a relief which could not otherwise be obtained, there are or can be laws which will make such a step costly to one who takes it.

Fourth. There is a common, and we fear, well-grounded opinion that the procedure of many courts in divorce cases is very loose. This, if it be true, evinces a want of due regard for the most sacred things among men, without the protection of which there could be no morals and no religion. We fear that the number of divorces cannot be lessened without stricter action on the part of the judges. And to those who may feel that it is an idle thing to keep alienated parties together, we offer the opinion of a great English lawyer, Sir W. Scott (Lord Stowell): "If it were once understood that, upon mutual disgust, married persons might become legally separated, many couples who now pass through the world with mutual comfort, with attention to their offspring and to the moral order of society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of most licentious and unreserved immorality."

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SOME misconception prevails in regard to divorce laws and their administration in the Western States. No city has suffered more from its supposed laxity in this respect than Chicago. Considering the origin and magnitude of its population, made

up by the confluence of the separate overflows of all nations, the public will doubtless be surprised to learn that that city lags behind many parts of the East in the relative number of its divorces. By those who know the facts, this has been publicly admitted. In a sort of pastoral allocution delivered two years ago to her various churches, through the mouth of one of her clergy speaking from the platform of the Boston Monday lectureship, New England made sorrowful confession of her own preëminence in this unsavory business. If her mouth-piece, the Rev. Dr. Dike, is to be believed, the liberal divorce system among us is to be reckoned as a New England idea. Before inquiring, as we purpose doing, into the operation of the divorce laws of Illinois, it may be worth while to ask whether the prevailing system of divorce is to be credited to New England. In brief, then, before the rise of Christianity, the leading nations of the world allowed unlimited divorce, either by the consent of the parties, or at the will of the husband. This was the law of the Hindoos, the Chinese, the Jews, the Romans, the ancient Britons, and, with some reservations, of the Greeks. Christianity, reënacting the supposed divine law, placed strict limits to the right of divorce, confining it to a single cause, adultery, by which seems to have been meant only the adultery of the wife. From the union of the Christian and Roman arose the canon law, which, as the law of the Church of Rome, became, as to marriage and divorce, that of Christendom. Down to the Reformation, divorce *a vinculo* was by that law allowed only for causes arising before the marriage, as precontract, consanguinity, and the like, which were declared to make the marriage void *ab initio*. Adultery and other causes, subsequent to marriage, to the common mind equally justifying causes of divorce, were made grounds merely for a separation *a mensa et thoro*. The early reformers revolted against these canonical restrictions, and in all communities in which their principles have prevailed a more liberal system of divorces has been established. Milton, in his "Tractate on the Doctrine and Discipline of Divorce," laid down the authorities and the reasons supposed to justify this change.

So far, then, from being a New England idea, liberality in granting divorces is a step in the general movement for greater social freedom which characterizes our modern age. If New England has become distinguished for it, it is because she has reverted farthest toward the original type. When diverse ten-

dencies have become balanced and the system has reached its best, there will be much freedom of divorce, but with it a constant and powerful pressure of moral considerations tending to prevent it. Whether the pendulum, swung by the early Fathers too far in one direction, has not by many communities been swung too far in the other, is a great social question, which, doubtless, is not settled by pointing to the practice of New England. But the fact that New England has a particular practice, to many minds proves that it is not obviously immoral, and that it must have plausible reasons to show for itself as a social necessity.

The diversity of modern law and practice of divorce rests upon differing conceptions of the nature of marriage. The extreme secular theory is that marriage is a mere civil contract, subject to be dissolved, like any other contract, by the civil tribunals. That of the Roman Church, and of those communities which have adopted or inherited the canon law, is that marriage is a sacrament, dissoluble only by death or by papal dispensation. A third theory, advanced by writers on private international law, is that marriage is a civil contract, and more, that it is the creation of a *status* which is of public, and even of international concern; and that while it may, for sufficient causes, be dissolved, it is not the Church alone, nor the immediate parties to it alone, that are concerned in its dissolution, but that the state in which the parties are domiciled has a controlling voice in fixing its causes and its consequences. Properly viewed, divorce is a religious question only for the Church; for the state it is merely a social question, and, consequently, as intimated by Hume, "all regulations" touching marriage and divorce are "equally lawful and equally comformable to the principles of nature"; hence, they are equally subject to modification by the public authorities. Indeed, diverse customs and laws touching these subjects have been but attempts at different stages of civilization to reach the golden mean, where, either by the enforced continuance of marriage or by divorce, the evil to all concerned should be the least, and the good the greatest,—the test question being, What regulations will best subserve the interests, first of society; secondly, of the children; and lastly, of the parties themselves?

The arguments bearing on the question of liberal or of restricted divorce are very nicely balanced. Where by law

marriage is indissoluble, or where too great obstacles are thrown in the way of its dissolution, the discontented parties are likely either to abscond, or to defy law and religion, and sink into flagrant immorality. This presents the least injurious phase. Compelled to continue a hated union, they may endeavor to cast off their burden by crime, or seek revenge by brutal treatment of the innocent standing in the way. The law of England before the Divorce Act of 1858 illustrates these principles. Before a husband, for instance, wishing to marry again, could procure a divorce from his wife who had robbed him and run away with and married another man, he must have had recourse, at great cost, to three separate tribunals, ending with the House of Lords. This regulation, which rendered men desperate, was a fruitful source of crime. The experience of Rome was to the same effect. The maxim laid down in the pandects, *bona gratia matrimonium dissolvitur*, was much restricted by the later emperors, but the Emperor Justin restored the ancient license. The reason given was that "the hatred, misery, and crimes which often flowed from indissoluble connections, required as a necessary measure the restoration of the law by which marriage was dissolved by mutual consent."

On the other hand, the knowledge on the part of married persons that they may easily, or for slight causes, dissolve their relation, tends to make all marital differences irreconcilable. But, if it be known that no divorce will be allowed for any cause, or that nothing but an offense of the most serious character can be made the ground for it, and that only at great cost in money and in social ignominy, quarrels will be settled and a *modus vivendi* discovered. This is the chief argument against liberal divorces. Whether it is of such weight that it ought to lead to a return to the restricted system of the canon law, or to a material modification of our divorce laws, is a question that can be determined only by studying the results of those laws as shown in experience.

The experience of South Carolina, though perhaps exceptional, is remarkable. Down to the period of reconstruction in 1868, no absolute divorce had ever been allowed in that State for any cause, and the general opinion seemed to be that the system had worked well. During the first years of reconstruction the old law was repealed and divorces were freely allowed. After a few years' trial the old law was restored, experience having taught

the law-makers of the State that the old law worked better than the new. Whether, under the former, those desiring divorce had emigrated to other States, thus swelling unfairly their divorce statistics, does not appear, and doubtless the experiment in an isolated community, under such circumstances, must be far from decisive.

In Illinois, divorces *a vinculo* are granted for adultery, extreme and repeated cruelty, desertion, and habitual drunkenness continued for two years, and for felony. Some other causes are specified, but they are of rare occurrence and may be omitted. Cook County, in which is the city of Chicago, had a population, in 1880, of 607,468. In the year 1882, divorces were granted in 714 cases. Of these, 665 were cases in which no defense was interposed by the party accused, and 49 cases in which there was an issue tried by a jury or by the court. In something over two-thirds of the cases (the exact figures are not given), the wife was the complainant. During the same year there were in Cook County 9,605 marriages. That gives one marriage to every 63.2 of the population; one divorce to every 13.4 marriages, and one divorce to every 850.7 of the population. Of the 714 divorces granted, 318, or 44.5 per cent. were for desertion; 142, or 19.8 per cent., for adultery; 141, or 19.7 per cent., for cruelty; and 93, or 13 per cent., for drunkenness. These figures are undoubtedly painful ones, but, as intimated, they are below those exhibited by some of the older States. Thus, in Maine, in 1878, there is said to have been one divorce to every 819 inhabitants; and in Penobscot County, the seat of a theological seminary, one to every 820 inhabitants. In the Western Reserve, a district of Ohio originally settled by emigrants from New England, there is said to have been, in 1878 and 1879, one divorce to every 11.8 marriages; in Ashtabula County, one divorce to every 8.5 marriages; and in Lake County, one divorce to every 7.4 marriages. When it is considered that Vermont is an old State, with a fixed population of nearly pure American descent, the ratio of one divorce to every 14 marriages, in 1878, indicates a much greater laxity in its divorce laws than prevails in Illinois, even if no credit be given to the assertion made by citizens familiar with the facts, that in a certain county of Vermont, out of 22 divorces granted at one term of court, 21 were believed to be collusive. These figures remind us of the activity of the French courts during the Revolution, when, in the first

three months of 1793, according to Burke, there were 562 divorces in Paris alone, being about one to every three marriages, and the same ratio continued for several subsequent months.

In respect to the nativity and the business and social standing of the parties to divorce suits, it is, of course, impossible to make precise statements; but it is believed that a large majority consists of freshly arrived immigrants from Europe, and from other States, the latter class preponderating. This arises, in many cases, doubtless, from the lessening of social restraints by change of residence, while in others the change was made probably for the purpose of procuring a divorce. Foreign-born applicants for divorce would rank, in point of numbers, thus: Germans, including Austrians, Prussians, and all others speaking German, Bohemians, Poles, Scandinavians, English, Scotch. To these may be added a few Irish and a few Jews, generally persons upon whom religious restraints have ceased to be operative. No business or profession fails to contribute its quota to the throng seeking divorces, but the number of so-called professional men is not large. The bulk consists of workingmen, mechanics, runners for commercial houses, clerks, saloon-keepers, actors, gamblers, farmers, and other classes of rather obscure men. Boarding-house life is especially fatal to permanence of the marital relation, perhaps because in it wives are commonly left without employment, and fall a ready prey to sinister influences. Every one, also, conversant with divorce trials, is struck by the frequency with which wives or husbands in the humbler walks of life tire of their connection, and abandon their homes, the wives carrying with them all that those homes contain, the husbands taking their ready money and most valuable effects, and neither ever returning. The more uneducated and inconspicuous the married persons, the more numerous are their divorces. And the number of the well-to-do, or rich, seeking divorces, is very small; not because they are necessarily more virtuous, but because the social pressure upon them, and perhaps their intelligent perception of consequences, is greater.

But by far the most important question relates to the rightful causes of divorce.

It is conceded by all codes that permit divorce at all, that adultery is a sufficient cause. In the history of opinion in regard to it, however, there may be noted three grave inconsistencies: in the Bible the adultery held to justify divorce *a vin-*

culo seems to have meant, as it did among the ancient peoples generally, only the adultery of the wife; when the rule was extended so as to deal equally with both sexes, the divorce permitted for it was confined to a separation *a mensa et thoro;* and finally, the sincerity of the Church in opposing divorces was placed in doubt by its practice of authorizing them for money, by papal dispensation—thus, for mere purposes of revenue, winking at an infraction of the supposed divine law against divorces. As to the first, the reason given for the limitation was, in the main, a selfish, pecuniary one, personal to the husband—the danger of having cast upon him the care of spurious offspring. Spurious as to whom? Of course, as to him alone, since as to the wife, the term could have no application. But was the offense, when committed by the wife, ever intrinsically more destructive of the integrity of the marriage, or in its consequences more fatal to the interests of the family, or of the public, than the adultery of the husband, formerly winked at by the law and tolerated by the Church? What force to justify even a separation, as against a wife, was there in the danger of spurious offspring, in a state of society like that which existed in France from the time of Louis XIV. down to the Revolution, of which there could be no more graphic or accurate description than that of Mehemet Effendi, a Turkish ambassador, when he said to a Frenchman: "The Turks are great simpletons in comparison with the Christians. We are at the expense and trouble of keeping a seraglio, each in his own house; but you ease yourselves of this burden and have your seraglios in your friends' houses." So of the rule authorizing divorces *a mensa* for the adultery of both sexes, it clearly was not the rule of Jesus, but an extension of it to meet social exigencies. If the rule could be extended at all for such a purpose, why might it not be extended so as to cover all the real exigencies of society? Looking alone to the consequences, is adultery, by whomsoever committed, deserving of greater condemnation than extreme cruelty, which, if repeated, is made the ground of divorce? Cruelty is defined as physical violence endangering health or life, and making longer cohabitation practically impossible. From the nature of the case, such cruelty is commonly exercised by the husband upon the wife. A brutal temper can wreak itself upon its object in but two ways—by acts of violence, and by injurious words. The

acts are commonly blows with the fist, or with the first weapon that comes to hand, dragging the wife by the hair of the head, and the like; the words, those dreadful epithets which, addressed to a woman, wound more cruelly than blows. If the offender be the wife, there are assaults with dangerous weapons, poison in one's coffee, with the most opprobrious adjectives in the language applicable to man. Such conduct indicates a temper incompatible with the marital relation, and, while it may inflict a less poignant mental distress than the scriptural cause, it ought not to be permitted, on any terms, to continue. It renders one great object of marriage, the right training of offspring, impossible.

Consider, also, the case of desertion. We have seen that nearly one-half of all the divorces granted in Chicago during 1882 were for that cause; in a majority of the cases, for desertion of the wife by the husband. The typical case of desertion is that of a worn-out, heart-broken mother left by her wretch of a husband to struggle against poverty, alone, with his children; their natural protector in the meantime playing elsewhere, perhaps, the role of father, after a fraudulent divorce from her, or a criminal second marriage without divorce. In many cases the deserting husband has returned, after his wife, by years of struggle, has acquired a little home and a comfortable support for his children, and quartered himself upon her, contributing nothing to her support, and often selling her household furniture for drink. The great extent of our country and the migratory habits of our people make these the commonest of all the histories of domestic misery in our courts.

So we might go through the whole catalogue of causes. We shall refer to but one more, that of habitual drunkenness. In the present state of our laws there may be much drinking of spirituous liquors without legally endangering the *status* of marriage. So long as a husband is able to give to his family a maintenance and education suitable to their condition in life and adequate to their physical necessities, however loathsome he may be to his wife, however unkind to his children, however useless to society, he may continue to squander his means, to brutalize himself, and to disgust his friends, with impunity. Before he can be divorced for drunkenness, he must fail to give to his family a pecuniary support. As if the mere failure to feed and clothe his wife were the greatest, the most intolerable injury to

her, and the compulsory making of her, year after year, the mother of offspring likely to become drunkards, ought to go for nothing! While demanding the production of the technical evidence required by law, no judge, passing upon cases of that kind, can or ought to overlook the terrible evidence of physiological fact exhibited in the swollen face, the shaking hands, and the tainted breath. No such man ought to be allowed to become the father of any woman's children. The best good, therefore, of the wife, of the children, and of the public, demands that some divorces shall be granted for non-scriptural causes. This no one much conversant with the trial of divorce cases will deny. But, when this is said, all has been said that can be truthfully said in favor of liberal divorces as they are granted in Illinois. It is our firm conviction that, if the truth could be ascertained, at least two-thirds, perhaps four-fifths, of the seven hundred and fourteen cases of divorce during the past year in Chicago either were fraudulent in fact, or, with a reasonably conciliatory temper on the part of the couples divorced, and under sufficiently stringent legal conditions, were avoidable or preventable. There is, beyond question, fraud in the inception of many cases. Most proceedings for divorce being against non-resident persons, brought into court by advertisement, of which a copy has been mailed to the residence of the defendant, if known, in a great many cases the residence is sworn to be unknown, and the result is a mere *ex parte* trial. In others, doubtless, there is real or virtual collusion: if there is no actual agreement not to contest the divorce, there is a willingness that it should be granted. A divorce suit is the only one known to the law in which both parties may desire the decree asked for in the bill. If disposed to collude, the fact is very difficult of detection. So, in all cases of resident defendants not appearing, one or all of these conditions may, and often doubtless do, exist. While fraud or collusion may be suspected, if the technical proofs, well understood by the bar, are furnished, even if they have been manufactured, the court is generally powerless to look behind them, and the decree is granted. In far the greatest number of cases, no court, listening to the narratives of the parties, can doubt that, had they been held together by an iron bond making divorce impossible for any cause, they would, at an early stage of their marital differences, have effected a rec-

onciliation; the fatal step of revealing to gossiping friends their real or fancied wrongs would not have been taken, and so their mutual wounds would have healed "by the first intention."

If some divorces on all the grounds stated ought to be granted, and if, as the laws are, there are vast numbers that ought not to be granted, what shall be done to remedy the evil? The answer is, the proceedings must be so modified as to reduce fraud and collusion to a minimum; the consequences of a decree must be made to the guilty party highly punitory, and the public sentiment in regard to divorces must be corrected. The first requisite to an honest divorce is an actual domicile of the complaining party, for a considerable time, within the jurisdiction. The one year required by Illinois law is not enough. It invites immigration for the purpose of divorce. The next requisite is actual notice to the defendant, by copy of the bill, or proof to the satisfaction of the court that his or her residence cannot be ascertained. This would cut off a large part of all the fraudulent divorces, rendered upon notice by publication in a newspaper. Still more important is it that all third parties interested in the suit, the children and the public, should be made parties, and be represented by counsel. Not only is a divorce suit the only one in which both the ordinary parties may be colluding to procure the same decree, but it is the only one in which parties directly and often the most deeply interested, like those mentioned, are never made parties. To correct this evil, there should be appointed for the children a guardian *ad litem*, and it should be made a condition to the commencement of a divorce suit, that, unless exonerated from it by special order of the court, the complaining party should deposit with the clerk a reasonable fee for such guardian, and that the guardian should be required to make careful inquiry, and, if possible and just, an actual defense in the case. A similar regulation should exist as to the public, save that the State's attorney should be required to appear and defend all suits for divorce.

So much touching the notice and defense. Beside these changes, there should be one in the consequences of decrees of divorce to the offending parties. To permit both divorced parties to marry again is to place a premium upon the commission of the offenses by law made the grounds of divorce. Chancellor Kent speaks of one case in which he was satisfied adultery had been committed for the very purpose of bringing about a divorce.

If that was true in New York, where no marriage is permitted to the offending party, how much more likely is it to be so where, as in Illinois, both parties may marry again. In one case, at least, in the experience of the writer, that species of fraud was committed. In cases of desertion, it should be provided that, if the complainant be a wife, the court should have power to grant the divorce, or, at her option, to continue the case, to await her application for a requisition to compel her husband to return and resume the performance of his marital duties. Upon his undertaking to do so, he might be discharged, upon reasonable conditions as to future good conduct; or, upon his refusal, he might be ordered to be committed to prison, if it should appear that he had absented himself from her without reasonable cause and against her will. That this scheme of legislation would involve a Federal enactment authorizing requisitions in such cases, constitutes no objection to it. One who has lost a watch worth fifteen or twenty dollars, by theft, in Maine, may set in motion the formidable machinery of State and Federal law, and drag the thief back to that State from the remotest corner of Oregon. Why should the wretch who has left his helpless wife and children, in the same State of Maine, and "gone West to grow up with the country" and another wife, not be dragged back from Oregon as well? If it be said that theft is a crime, and that the desertion of one's family is a mere social wrong, then let the wrong, so infinitely surpassing the crime in its meanness and in the misery it entails, be reclassified, or a definition be given to crime which shall embrace it. Doubtless a Federal statute upon that subject ought to be supplemented by others regulating the whole subject of marriage and divorce, now, under the varying statutory regulations of the States, the despair of courts and publicists and the opprobrium of the law. Finally, the most effective remedy will be the elevation of public sentiment in regard to the sanctity of marriage; not sanctity in the ecclesiastical sense, which makes of it a sacrament, but in that of the highest social obligation that can bind the conscience of a man of honor and honesty —the obligation to keep the faith he pledged in marriage to his wife and to the state, and which he renews upon the birth of each of his children, to abide with her until death, unless separated by law for strictly necessary causes.

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